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May 3, 2004

Frances M. Hart,
Executive Secretariat
Equal Employment Opportunity Commission, 10th Floor
1801 L Street, N.W.
Washington, D.C. 20507

Re: Additional Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures as They Relate to the Internet and Related Technologies

Dear Ms. Hart:

We, the undersigned members of the Leadership Conference on Civil Rights (LCCR) Employment Task Force, appreciate the opportunity to submit these comments in response to the proposed additional Questions and Answers to clarify and provide a common interpretation of the Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines") as they relate to the internet and related technologies, published on March 4, 2004 in the Federal Register (hereinafter referred to as "Proposed Q&As").

LCCR is a diverse coalition of more than 180 national organizations representing a broad constituency, including persons of color, women, children, labor unions, individuals with disabilities, older Americans, major religious groups, and gays and lesbians. As members of LCCR, we have a shared commitment to advancing equal opportunity in employment and in ensuring that all Americans are treated fairly in the workplace. We believe that the Proposed Q&As raise several serious concerns that must be addressed before the proposal is finalized.

I. Background:

A. Context. The Uniform Guidelines have been an important tool for ensuring that workplaces operate free of discrimination, and that individuals applying for a job are treated fairly during the hiring process. In evaluating the Proposed Q&As, it is important to understand the broader context for the Uniform Guidelines, as well as many other workplace rules and guidance. These guidelines and rules have been developed, in part, to remedy persistent discriminatory employment practices that disproportionately have shut minorities and women out of valuable job opportunities. Although they receive little public attention, we believe that the Uniform Guidelines in particular play a critical role in providing much-needed direction to employers and federal contractors, and ensuring that the selection procedures used to hire employees are fair, appropriate, and precise. They also ensure that employers keep accurate records about their hiring processes so that there is comprehensive information about who applied for a job and how different candidates were selected. As such, they provide a standard for good business practice that is essential and vital to maintaining fair, unbiased workplaces for employees and employers

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alike. Further, because they reflect the collective wisdom of the four key federal agencies¹ responsible for enforcement of workplace laws, the Uniform Guidelines provide invaluable guidance to courts as they consider how the law should work.²

A particularly important feature of the Uniform Guidelines is that they require employers to keep records about applicants, including information on race and gender composition. In conjunction with these recordkeeping requirements, employers also are required to analyze the selection procedures used to whittle down the pool of applicants for a particular job to determine whether the procedures have had any adverse impact on a particular group of female and/or minority applicants. This type of analysis is critical to making sure that women and minorities are treated fairly during the hiring process. It also is a necessary part of ensuring compliance with the law and maintaining strong and vigorous civil rights enforcement.

B. Key Principles: With this broader context in mind, we believe there are several key principles that should frame any discussion about the Proposed Q&As. First, it is critical to ensure that all applicants are treated fairly when applying for a job. Any proposal under consideration must be crafted to strengthen, and not undermine, potential applicants' confidence in the overall hiring process. Second, it is important to make certain that individuals who legitimately believe that they have applied for a job are not excluded unfairly from consideration as applicants. Third, we must ensure that individuals who are similarly situated – e.g., individuals who apply for a job in the same way – are treated in the same manner, regardless of whether they utilized the internet in their job search or not. If individuals use the same strategy to apply for a job, it is unfair to exclude some of them from the applicant pool while including others who used the same approach in applying for the job, whether the application was submitted through the internet or not. Fourth, we must promote consistency in employer practices and minimize chances of arbitrary employer practices or procedures. Employers who are inconsistent in their practices and do not comply with their own rules can end up creating more confusion about the procedures potential applicants are expected to follow. Thus, it is crucial to focus any analysis on the employer's *actual* practice, rather than any procedures that the employer says it follows. Fifth, we need to preserve comprehensive recordkeeping by employers to ensure that the identity of all persons considered for a vacancy, whether formally or informally, is recorded. Finally, we must ensure that goals to expand the use of new technologies and to pursue vigorous enforcement are not pitted against each other; rather, these two goals should work together in a complementary fashion so that we can provide guidance to employers and other federal personnel who have enforcement responsibilities. We believe that these framing principles are a crucial part of evaluating the Proposed Q&As, and helping to accomplish the overarching goal of ensuring that all job applicants are treated in a fair and even-handed manner.

II. Comments on Proposed Q&As:

The proposed guidance includes several questions and answers that focus on hiring practices in the context of the internet and other electronic data processing technologies. It also solicits comments on the value and utility of the information employers are being asked to collect in the context of this proposal. As discussed below in greater detail, we believe the proposal raises a number of serious concerns, particularly regarding the question of which individuals are to be considered “applicants” for jobs. It is

¹ The Proposed Q&As were issued, jointly, by four agencies: Equal Employment Opportunity Commission (29 CFR Part 1607); Department of Labor, OFFCP (41 CFR Part 60-3); Department of Justice (28 CFR Part 50); Office of Personnel Management (5 CFR Part 300).

² See, e.g., *Bushey v. New York State Civil Service Comm'n*, 733 F.2d 220, 225-226 (CA2 1984), cert. denied, 469 U.S. 1117, 105 S.Ct. 803, 83 L.Ed.2d 795 (1985); *Firefighters Institute v. St. Louis*, 616 F.2d 350, 356-357 (CA8 1980), cert. denied sub nom. *St. Louis v. United States*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981).

important at the outset, however, to acknowledge the parameters of the proposal under consideration. Specifically, the pending proposal is, by its terms, limited only to internet and electronic data processing technologies used for recruitment and selection. Further, in the discussion of the meaning of the term “applicant” in the internet context, the guidance has declined to define “applicants” as individuals who meet a certain set of “minimum qualifications.” In both cases, these are critical limits that properly confine the reach of the overall proposal, and we commend the agencies for incorporating these limits into the proposal.

Focusing the proposal solely on the unique challenges presented by the internet and other emerging electronic data processing technologies is consistent with the recognition that the hiring and selection practices using these types of technologies were not contemplated when the Uniform Guidelines were issued. Employers using these new innovations, thus, may benefit from additional guidance. Declining to incorporate the concept of “minimum qualifications” into a definition of “applicant” is also essential to ensure that arbitrary criteria are not used to exclude individuals from being considered for jobs. Too often, potential job applicants have been screened out of jobs unfairly because they did not meet certain “qualifications,” even though the qualifications may not have been necessary for the job at issue. In the seminal *Griggs*³ case, the Supreme Court made clear that an employer’s job qualifications must be job-related and consistent with business necessity, and that hiring criteria failing to meet that standard could be deemed unlawful. We believe that the term “applicant” should not be confined to individuals meeting certain “minimum” criteria, because such restrictions can be manipulated to exclude from consideration qualified individuals capable of performing a particular job. It can often be the case that an applicant has unique experiences, perhaps that the employer never contemplated, that are comparable to the stated job qualifications and could enable an individual to perform a particular job well. Moreover, even if a person is unqualified for a job, they should be deemed an applicant and recorded as such if they applied for the position. Their lack of qualifications just explains why it is appropriate not to hire that individual. We believe that an employer’s records must reflect the entire pool of job applicants, as well as documenting how that pool was narrowed to a smaller group of candidates. Keeping in mind these parameters, we detail below several serious concerns about the Proposed Q&As.

A. Clarification to Q&A96 is needed regarding what is meant by the term “applicant” in the context of the internet and related electronic data technologies. The proposed Q&A96 suggests a three-prong test to evaluate when an individual is an “applicant” in the context of the internet and related electronic data processing technologies. Specifically, the text states:

“In order for an individual to be an applicant in the context of the Internet and related electronic data processing technologies, the following must have occurred:

- (1) The employer has acted to fill a particular position;*
- (2) The individual has followed the employer’s standard procedures for submitting applications; and*
- (3) The individual has indicated an interest in the particular position.” 69 Fed. Reg. at 10155.*

We believe that each of the three prongs raises serious questions that require clarification and we recommend the following changes to address our concerns.

³ *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-4 (1971).

1. Comments on First Proposed Requirement: (1) The Employer has Acted to Fill a Particular Position.

- *The proposed Q&A96 does not go far enough in explaining how an employer can “act” to fill a particular position.* It is important to make clear that employers can “act” to fill a position in a multitude of ways. An employer need not formally “announce” or post a vacancy in order to be considered “acting” to fill a position. Often, an employer moves forward on filling a position without any sort of public statement. Accordingly, the language in the proposal should be modified to reflect this reality in employer practices. Specifically, we recommend incorporating the following clarifying language: “The employer has acted to fill a particular position, regardless of whether it has been posted or announced in a public forum.”
- *The proposed Q&A96 should emphasize the need for consistency in employer practices.* Determining whether an employer has “acted” to fill a particular position will depend, in part, on each employer’s practices. Some employers send out formal advertisements and post vacancy announcements; others may rely on informal networks and word-of-mouth. Whatever strategy the employer uses, the employer must be consistent so that potential applicants have a clear understanding of when to move forward to apply for a job. Thus, if an employer tells internet applicants that it will “act” to fill a particular position by posting an announcement on the web-site, but then interviews non-internet applicants before the position is posted, at a minimum, those internet applicants who are similarly situated to the applicants actually interviewed also should be considered.⁴ They also should be identified as applicants for recordkeeping purposes. Otherwise, such inconsistency would defeat one of the main purposes of the Uniform Guidelines, to make sure that all applicants are treated fairly during the job application process. We recommend adding an example to make this specific point more clearly.

2. Comments on Second Proposed Requirement – (2) Individual has Followed the Employer’s Standard Procedures for Submitting Applications.

- *Modify proposed Q&A96 to focus on whether applicants have followed the hiring procedures that have been communicated.* Some could read the proposed language of this second requirement to suggest that potential applicants must follow a generic set of formal, “standard procedures” to be considered an applicant. We recommend modifying the proposed language to make clear that applicants must follow the process communicated by the employer, whether it involves an employer’s “standard” procedures, procedures created especially for a particular job opening, or even a more informal process. The main inquiry should focus on whether the candidate did what she/he was told, rather than whether they adhered to “standard procedures” that may or may not have been communicated.
- *The proposed Q&A96 should make clear that information about employer hiring procedures may be communicated to potential applicants in many different ways.* Employers may be contacted by potential job applicants via the internet at any time, regarding a specific job opening, future job openings, application procedures, etc. Thus, it is critical for the employer to communicate accurate information to these potential applicants about the process they must follow to submit applications. The employer may decide to have general application procedures that apply to all jobs; the employer may have unique procedures that

⁴ Arguably, those applicants who can demonstrate that they relied on the employer’s erroneous information also should be considered for the position.

will apply to each job opening. Whatever the process, the only way an applicant can adhere to the proper procedures is if those procedures are communicated properly and in a timely fashion. That information can be communicated in many different ways, either verbally or written, or both – e.g., being posted on a web-site in conjunction with a specific job announcement, having general procedures on an employer’s homepage on how to submit applications, or providing instructions over the phone regarding how to submit an application on-line. But it must be done in a way that is likely to ensure that applicants will receive the proper information. It is then the responsibility of the potential applicants to act reasonably in deciding how to apply for a job.

- *The proposed Q&A96 should stress the importance of ensuring that every applicant who is considered has followed the same procedures.* Ultimately, what is critical is that employers are consistent in the hiring procedures that they use. Employers must follow the rules they have in place, and not change the procedures *after* potential applicants have relied on specific procedures that have been previously established. Thus, when an employer considers applicants for a particular position, everyone who is considered should have followed the same procedures, whether or not they used the internet. For example, a large manufacturing company requires internet applicants for an accounting position to complete a special form and e-mail it to the Human Resources Department. One-hundred internet applicants follow this procedure, but twenty-five internet applicants e-mail their resumes, instead, to personal contacts and ask them to forward the resumes directly to officials in the Accounting Department. The employer includes the one-hundred properly submitted applications in the selection pool and excludes the twenty-five applications improperly submitted. It would be inappropriate for the employer to consider any other non-internet applicants who did not follow these special form/e-mail procedures.

- *If an employer deviates from its hiring procedures, then individuals who did not follow those procedures but are similarly situated to those who were considered for the position should be considered as well.* If, in the example above, the employer deviates from the special application process by adding ten resumes into the selection pool that were handed to various senior officials and passed to the head of the Accounting Department, then the twenty-five internet applicants who sent their resumes to their company contacts also should be considered and recorded as applicants. In such a case, the twenty-five internet applicants would be similarly situated to the ten non-internet applicants who were added to the selection pool. It would be unfair to exclude some of these applicants from the hiring process and include others if they all applied in a similar fashion. The important point is that this requirement should be subject to the *actual* and *specific* practices used by the employer to hire for a particular position.

To address all of these points, we recommend modifying the language to read: “Individual has followed the procedures, communicated either verbally or in writing, for submitting applications, or is similarly situated to those actually considered for the position.” We also recommend adding examples to the proposal emphasizing that employers must treat similarly situated applicants in a similar fashion, and that explicitly stress the importance of uniform procedures.

3. Comments on the Third Proposed Requirement – (3) Individual has indicated an interest in the particular position.

- *The proposed Q&A96 should make clear that there are multiple ways for a potential applicant to indicate an interest in a particular position.* In evaluating this third requirement, it is important first to recognize that an individual can “indicate an interest” in a particular position in many different ways. Determining whether an applicant has indicated an interest in a certain job depends, in part, on the hiring process the employer sets up, and whether the employer and the applicant have acted reasonably in following the procedures that have been put in place. If an individual visits an employer’s web-site and, in response to different prompts, e-mails a resume expressing an interest in certain types of positions, then in many instances that person would be considered to have expressed an interest in a job with the employer. That action may or may not also be enough to demonstrate an interest in a particular position, but that determination will depend on the instructions given to the potential applicant. If the person is told that the resume will be kept and considered as positions become available, then the person might reasonably believe that they have indicated an interest in a particular position. If the person is told that no positions are available and they should continue to check the web-site and apply as positions are posted, then the person is on notice that they have an affirmative responsibility to apply for positions as they are announced. We believe that the proposed Q&A96 should make clear that individuals who reasonably believe, based on the information they received from the employer, that they have applied for a particular position should be considered applicants for that position and recorded as such.

- *The proposed Q&A96 should point out that the submission of an application for a particular position can satisfy more than one of the proposed three-prong test requirements.* If an individual follows an employer’s instructions and submits an application for a particular job on-line, then that action usually will satisfy both the second and third proposed requirements. In submitting the application, the individual both followed the employer’s procedures, and also indicated an interest in a particular position. Even though the proposed Q&A96 discusses these as two different requirements, it is important to recognize that the same information can be used to demonstrate compliance with both requirements.

- *The proposed Q&A96 must incorporate language ensuring that similarly situated applicants are treated in an equal manner.* As already discussed above, the assessment of whether an individual has satisfied the three proposed requirements must include an inquiry into the employer’s actual hiring process. Two important factors to consider are how that hiring process has been implemented and what instructions have been given to potential applicants. To ensure that the records on applicants accurately reflect the actual hiring process, we believe that individuals who are similarly situated – i.e., those that apply for a job in the same way – should be treated in the same manner. This means that if an employer includes in the applicant pool individuals who handed their resumes to different employees in the department with the job opening, then the employer also must include internet applicants who e-mailed their resumes to that department, even if that is not the process that was laid out. In short, candidates who are similarly situated to those actually considered also must be deemed applicants.

To respond to all of these concerns, we recommend incorporating the following clarifying language: “Individual upon reasonable belief has indicated an interest in the particular position, or is similarly situated to those actually considered for the position.”

B. Clarify proposed Q&A97 to make clear the applicable legal standards and outline the scope of employer responsibilities. The proposed Q&A97 focuses on the analysis employers must do to evaluate the impact of the different search criteria used to narrow the pool of job applicants.

1. The proposed Q&A97 must make clear that disparate treatment analysis is also available.⁵ We are concerned that proposed Q&A97 may be interpreted to mean that the search criteria that employers utilize will be subject *only* to disparate impact analysis. We propose specific language to make clear that both disparate treatment and disparate impact analysis are applicable.

2. The proposed Q&A97 should reiterate the importance of employer recordkeeping. Proposed Q&A97 should make clear that employers must maintain accurate records of their selection procedures, regardless of whether the employer uses traditional hiring methods or internet technologies.⁶ This information must be available to undertake any assessment of an employer's hiring process.

3. The proposed Q&A97 should clarify that an individual need not satisfy a "minimum qualification standard" to be treated as an "applicant." As already stated, we appreciate the fact that the Proposed Q&As do not propose to define "applicants" as individuals who must meet a certain set of "minimum qualifications." Nothing in the proposal suggests such a standard and we strongly oppose any effort to include such language in any part of the Proposed Q&As. At least one organization, however, has interpreted Example C from Q&A97 as an indication that "employers may use a minimum qualification standard in defining an applicant -- in this case two years of prior printing experience."⁷ This is not consistent with our interpretation of the guidance and we believe the analysis is incorrect. In order to preempt any confusion, we recommend that the guidance state specifically that "an individual need not satisfy a 'minimum qualification standard' to be treated as an applicant."

C. Comments on additional issues. The UGESP agencies invite comments about the Proposed Q&As, but also requested comments on four particular issues.⁸ We have responded to each issue below.

1. Comments on whether the collection of information is necessary for the proper performance of functions of the agencies, including whether the information will have practical utility. As noted earlier, compliance with and enforcement of key workplace laws requires comprehensive data collection, including data on how a particular position was filled. The collection of this data is both useful and practical to ensure that agencies have access to accurate and complete information about an employer's hiring process. Without such information, agencies would face enormous challenges in evaluating whether a candidate was selected for a particular job in a lawful manner. Comprehensive data collection is particularly critical to the enforcement of laws such as the Civil Rights Act of 1991 that prohibit employers from using hiring methods or other employment practices that have discriminatory effects on

⁵ Proposed Q&As, at 10156.

⁶ See 29 C.F.R. §1607.4 (employers "should maintain and have for inspection records of other information which will disclose the impact of its tests and other procedures"); 41 C.F.R. 60-3.15 (federal contractors "must keep records of the selection procedures utilized (either standardized or not standardized)").

⁷ See National Employment Law Institute, "OFCCP/Affirmative Action Newsletter," at 5 (March 2004), available at <http://www.neli.org/downloads/AANewsletter.pdf>.

⁸ Proposed Q&As, at 10157.

women and minorities. Thus, we believe that this type of hiring information has practical utility and is necessary to ensure vigorous enforcement of the law.

2. Comments on the accuracy of the agencies' estimate of the burden on the collection of information, including the validity of the methodology and assumptions used. The Proposed Q&As include no specific estimates of the burden associated with collecting hiring information. We believe that there is nothing in the proposal that suggests or imposes overwhelming new burdens on employers. While we do not support unfair burdens on employers, it is critical that employers assume appropriate responsibility for demonstrating compliance with the law. Sound recordkeeping practices and data collection are essential, and the minimal burden on employers to gather such information must be weighed against the more important goal of achieving fairness in the workplace and eliminating discriminatory employment practices. Furthermore, to the extent that this guidance provides more clarity and guidance for employers, it could lessen the burdens placed on employers to collect hiring data.

3. Comments on whether the proposal would enhance the quality, utility, and clarity of the information to be collected. As discrimination becomes more subtle and difficult to detect, particularly as applicants utilize emerging technologies like the internet for their job searches, strong recordkeeping provisions are critical to bringing clarity and transparency to the overall hiring process. The Proposed Q&As, with our recommended modifications, may help to provide more guidance to employers about the information they must collect. We believe, however, that the main focus should be on pushing employers to be consistent in their hiring practices, and ensuring that applicants are treated in a fair and even-handed manner.

4. Comments on whether the proposal would minimize the burden of the collection information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technical collection techniques or other forms of information technology. We support the use of electronic data collection – whether it is automated, electronic, mechanical, or otherwise – so long as it is comprehensive, coherent, and promotes fairness in the hiring process.

III. Conclusion. Because the Uniform Guidelines govern the selection procedures used for making employment decisions such as hiring, promotion, transfer, and other employment actions, any guidance issued by federal agencies must be carefully considered. As technology becomes more sophisticated, it becomes more important for our enforcement agencies to make appropriate adjustments, while also providing clear and effective standards that promote good business practices. We believe that the Proposed Q&As require important modifications, as described above, to ensure that all applicants are considered fairly and employers utilizing the internet and related technologies operate in a lawful manner.

Leadership Conference on Civil Rights

Comments on Proposed Q&As re the Uniform Guidelines on Employee Selection Procedures

We appreciate the opportunity to submit these comments and look forward to working with the EEOC, OFCCP, DOJ-CRD and other enforcement agencies to ensure that the Uniform Guidelines will continue to guide employers, federal contractors, and our courts in promoting fair employment practices and workplaces free of unlawful discrimination.

Sincerely,

American Association of People with Disabilities

Coalition of Labor Union Women

Lawyers' Committee for Civil Rights Under Law

Leadership Conference on Civil Rights

NAACP

National Asian Pacific American Legal Consortium

National Partnership for Women & Families

National Women's Law Center

Women Employed